

# **PRE-CONTRACTUAL DUTY TO DISCLOSE INFORMATION – A COMPARISON BETWEEN NORWEGIAN AND ENGLISH CONTRACT LAW**

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## **1 Introduction**

The subject of the thesis is a comparison between Norwegian and English contract law. The comparison will focus on duties to disclose information when entering into contract, i.e. before the parties are in an actual contractual relationship with each other.

### **1.1 Objective**

The main objective of the thesis is to identify the differences between the two legal systems in relation to the pre-contractual duty to disclose information.

### **1.2 Methodology/Delimitations**

The objective will be reached by independent examination of first the rules imposing a duty to disclose information in Norwegian law and then the rules imposing a duty to disclose information in English law. After examining the rules I will identify the differences between the application of the duties in Norwegian and English law respectively.

Considering the limitations in size imposed to this thesis it has been necessary to perform certain delimitations.

First, the scope of the thesis is limited to commercial contract. The intention by this is to limit the discussions to contracts where both parties can be considered professional actors, in opposite of contracts where one party is a consumer. This excludes discussions of statutes primarily imposing a consumer protection.

Second, only consequences flowing directly from the pre-contractual duties to disclose information will be discussed. This means that the ordinary remedies for breach of contract, i.e. damages occurring after entering into contract, will not be discussed.

### 1.3 Definitions

The background for imposing a duty to disclose information between the parties to a contract is somewhat different in the two legal systems. In Norwegian law the Norwegian term *opplysningsplikt* can easiest be translated into the term *duty to inform*. English law has adopted the term *duty of disclosure*. To simplify the possibility of referring between English and Norwegian law I have chosen to adopt a common term, namely *duty to provide information*.

## **2 Norwegian Contract Law**

Under this head will be discussed rules connected to duty to disclose information (3.1) and duty of examination (3.2) under Norwegian contract law.

### **2.1 Duty to disclose information**

#### **2.1.1 Introduction**

The objective under this head is to identify whether there are rules imposing a duty to disclose information in Norwegian contract law. The general rule is held to be that there is no duty to disclose information in Norwegian contract law.<sup>1</sup> This rule is based on a common contractual understanding that each party to a contract holds the risk of their own expectations and assumptions.<sup>2</sup> However, there are exceptions to the general rule so that there will be certain circumstances where a duty to disclose information will arise. The duty may be explicitly imposed by statute in connection with particular types of contracts, or it may be implied by the application of the rules enacted in the Norwegian Contract Act section 33. In addition the duty to disclose information may arise from the application of un-enacted principles imposing a duty of loyalty between parties entering into contract with each other.

In the following I will first discuss certain statutes explicitly imposing a duty to disclose information in subsection 2.1.2. Then I will discuss whether a duty to disclose information may arise from application of the rules enacted in The Norwegian Contract Act section 33 in subsection 2.1.3, or by application of the un-enacted duty of loyalty in contract in subsection 2.1.4. Finally I will discuss the requirement for level fault to be held liable for

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<sup>1</sup> Nazarian (2007) p. 359.

<sup>2</sup> See also Hagstrøm (2002) p. 141.

breach of duty to provide information in subsection 2.1.5 and the consequences of breach of a duty to disclose information in subsection 2.1.6.

### 2.1.2 Duty to disclose information imposed by statute

In this section of the thesis I will discuss a selection of statutes explicitly imposing a duty to disclose information. There are statutes in Norwegian law regulating certain contract types. Hagstrøm identifies typical contract legislation to include The Norwegian Sale of Property Act<sup>3</sup>, The Norwegian House-building Contract Act<sup>4</sup>, The Norwegian Craftsman Services Act<sup>5</sup>, and The Norwegian Home Rental Act.<sup>6</sup> Rules imposing a duty to disclose information exist in all the mentioned statutes. Most of the mentioned statutes will however fall outside the scope of this thesis due to their focus of consumer protection according to the delimitations in the main introduction. There are nevertheless other statutes falling within the scope. In the following I have chosen, and will therefore discuss, the rules imposing a duty to disclose information enacted in The Norwegian Insurance Contract Act<sup>7</sup> in subsection 2.1.2.1, The Norwegian Sale of Property Act in subsection 2.1.2.2, and The Norwegian Sale of Goods Act<sup>8</sup> in subsection 2.1.2.3. I have elected to discuss these three statutes as they may be applicable to commercial contracts, and also represent examples for situations where the legislator has chosen to enact a duty to disclose upon the parties entering into contract.

#### 2.1.2.1 The Insurance Contract Act

In this subsection I will discuss the rules enacted in the Norwegian Insurance Contract Act. The act imposes duties to disclose information both on the insurer and to the person effecting the insurance. It is however important to note that it is possible to agree upon

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<sup>3</sup> Lov 1992-07-03 nr 93: Lov om avhending av fast eigedom.

<sup>4</sup> Lov 1997-06-13 nr 43: Lov om avtaler med forbrukar om oppføring av ny bustad m.m.

<sup>5</sup> Lov 1989-06-16 nr 63: Lov om håndverkertjenester m.m. for forbrukere.

<sup>6</sup> Hagstrøm (2002) p. 135.

<sup>7</sup> Lov 1989-06-16 nr 69: Lov om forsikringsavtaler

<sup>8</sup> Lov 1988.05-13 nr 27: Lov om kjøp

deviating rules in certain commercial insurance contracts. Section 1-3, subsection 2 of the act identifies the circumstances allowing for agreed deviation from the rules enacted.

The first rule imposing a duty of disclosure is found in chapter 2 of the act under the heading the duty to disclose information by the insurer. Section 2-1 reads:

*In connection with the effecting of an insurance the insurer shall, to a necessary extent, make sure the circumstances are such so the person effecting the insurance can evaluate the insurance offer. This includes providing information whether there are considerable limitations in the coverage of the insurance compared to what the insured reasonably can expect to be covered by the insurance to be effected, whether there are alternative means of coverage and of extra coverage marketed by the insurer. If the effecting concerns several insurances the premium for each and one of them should be informed.*

*If the parties are not free to choose which country's legislation will be covering the agreement, the insurer is bound to inform which legislation is actually covering the agreement. If the parties are free to choose legislation, the insurer shall inform which legislation he suggests for covering the agreement. In addition the company shall inform about the rules for bringing disputes to a tribunal.*

This section imposes a general duty on the insurer to disclose information about the coverage and the exclusions of the insurance in discussion.<sup>9</sup> The scope of the duty is clear from the detailed composition of the act. The reason for such a detailed composition must be to make sure the person effecting the insurance is provided with all the information necessary to make a sound decision on whether to effect the insurance.

Next, there are rules imposing a duty to disclose information in chapter four of the act under the heading general conditions for the liability of the insurer. Section 4-1 reads:

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<sup>9</sup> Brynildsen (2001) p. 36.



*In connection with effecting or renewing a contract for insurance the insurer is entitled to ask for information which might be of important significance in the evaluation of risk. The person effecting the insurance shall give correct and complete answers to the questions asked. The person effecting the insurance shall also unsolicited provide information which he or she must understand is of important significance in the insurer's evaluation of the risk.*

*If the person effecting the insurance becomes aware that the information given about the risk is wrong or incomplete he shall without ungrounded delay inform the insurer.*

This section imposes a duty to disclose information on the person effecting the insurance, and describes the scope of the duty.<sup>10</sup> Brynildsen argues it is important both for the insurer and for the person effecting the insurance that the facts the risks are calculated from are complete and correct.<sup>11</sup> Brynildsen also identifies that the main rule is that there is normally no independent duty to disclose information imposed on the person effecting the insurance. Instead the insurer has been given the possibility to ask questions about circumstances relevant for the insurance to be effected. The person effecting the insurance simply has a duty to “give correct and complete answers.”<sup>12</sup> The independent duty to disclose information imposed to the person effecting the insurance only occurs in relation to information “of important significance” for the insurer in calculating the risk. In addition to the requirement for the information to be of “important significance”, the person effecting the insurance “must understand” that the information is of such importance.<sup>13</sup> An example for information being “of important significance” is according to Brynildsen a situation where there probability for disburse under the insurance in close proximity of time is high.<sup>14</sup>

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<sup>10</sup> Brynildsen (2001) p. 65.

<sup>11</sup> l.c.

<sup>12</sup> ibid. p. 67.

<sup>13</sup> ibid. p. 68.

<sup>14</sup> l.c.

The requirement “must understand” indicates that positive knowledge is not necessary, gross negligence is sufficient.<sup>15</sup> This will be discussed further below under section 2.1.5.

The consequences of breach of the rules in the Norwegian Insurance Contract Act will be discussed below under section 2.1.6.

#### 2.1.2.2 The Sale of Property Act

In this subsection I will discuss the rules imposing a duty to disclose information in the Norwegian Sale of Property Act. The act imposes a duty to disclose information on the vendor. Similar to as for The Norwegian Insurance Contract Act it is possible to agree to deviate from the rules enacted. This is evident from section 1-2 subsection 1 of the act.

The rule imposing a duty to disclose information is found in section 3-7 of the act.

Simonsen introduces the following translation of the section:

*“The property has a defect if the purchaser has not been informed about conditions which the seller knew of or could not have been unaware of, and of which the purchaser had reason to believe that he should have been informed. This, however, is only relevant if one could assume that the non-provision of information has influenced the contract.”<sup>16</sup>*

Three conditions for imposing a duty to disclose information can be identified in this section of the act. The first requirement is connected to the knowledge of the vendor, the second requirement is connected to the expectancy of disclosure of the information, and the third requirement is “that the non-provision of information has influenced the contract”.

The requirement for knowledge by the vendor has in Simonsen’s translation been defined by the formulation “knew of” or “could not have been unaware of.” A direct translation of

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<sup>15</sup> l.c.

<sup>16</sup> *Mistake, Fraud and Duties to Inform in European Contract Law* (2005) p. 215.

the last requirement would however read “must have known”. The formulation “knew of” seems quite clear, and indicates a positive actual knowledge. The formulation “could not have been unaware of”, or “must have known”, does however require further attention. In the preparatory documents for the Norwegian Sale of Property Act<sup>17</sup> it is held that the meaning is there must be no reasonable ground for ignorance. Krüger argues that this definition does not make sense as it indicates *should have known* would be sufficient to fulfil the requirement.<sup>18</sup> Krüger instead introduces the understanding of expected knowledge as incorporated in CISG 1980.<sup>19</sup> Selvig holds that the duty to disclose information does not cover circumstances the vendor *should* have knowledge about when it cannot be expected that he actually had the knowledge.<sup>20</sup> The Supreme Court of Norway has not given a clear definition of the expression in connection with cases on contract law. However the expressions “must have been aware of” and “must have known” are present in other statutes which have been interpreted by the court. In the Supreme Court of Norway Case published in *RT 1978 page 321* it is held that the normal understanding of the term should be adopted. This indicates that normal judgment would deem the ignorance incomprehensible. Simonsen’s translation above seems to have taken this interpretation into consideration.

The requirement of expectancy of disclosure is connected to the sort of information the buyer could expect to be disclosed. This is obviously closely related to the requirement that “the non-provision of information must have influenced the contract”. Selvig holds that information to be disclosed is information about circumstances usually being of significance for the buyer to make a decision on whether to buy and for evaluation of price to pay.<sup>21</sup> Based in court decisions he identifies examples related to unpleasant odours, leaks and moisture, as well as noise from neighbouring properties. Bergsåker argues the

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<sup>17</sup> Ot. Prp. Nr. 66 (1990-1991)

<sup>18</sup> Krüger (2004)

<sup>19</sup> I.c.

<sup>20</sup> Selvig (2001) p. 423.

<sup>21</sup> I.c.

scope of the duty to disclose information is quite wide and in addition to the examples above also covers development plans for the neighbourhood both by private persons and by public authorities as well as practical information about the usage of equipment being part of the property.<sup>22</sup> Furthermore specific historical circumstances concerning the property may be subject to a duty to disclose information.

The consequences of breach of duty to disclose information imposed by this section of the Norwegian Sale of Property Act will be discussed below under section 2.1.6.

#### 2.1.2.3 The Sale of Goods Act

In this subsection I will discuss the rules enacted in the Norwegian Sale of Goods Act. The act imposes a duty to disclose information on the vendor in certain circumstances. Similar to the Norwegian Insurance Contract Act and the Norwegian Sale of Property Act discussed above, the rules enacted in the Norwegian Sale of Goods Act may be deviated from by agreement. This follows from section 3 of the act. Martinussen does however argue that the duty to disclose information maintains also in contracts otherwise qualifying for deviation from the rules of the act by agreement.<sup>23</sup>

The rule imposing a duty to disclose information is found section 19 subsection one, alternative b) under the heading “Items sold “as is” and items sold on auction”. Subsection one alternative b) of the act reads:

- (1) Even though an item is sold “as is” or with similar common reservations, there is a defect on the item when:*
- b) the vendor has failed to disclose information about essential circumstances with the item or the use of the item which the vendor must have known and that the buyer had reasons to expect would be given to him, provided that the failure to disclose information can be expected to have induced the buyer in buying,*

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<sup>22</sup> Bergsåker (1997) p. 178.

<sup>23</sup> Martinussen (2001) p. 186.

The three same requirements identified in relation to the rules in the Norwegian Sale of Property Act above can be identified also for the rule in the Norwegian Sale of Goods Act. There are requirements for knowledge, expectancy and inducement.

The requirement of knowledge in my translation of the act is identified by the term *must have known*. The term is the same as introduced in the Norwegian Sale of Property Act discussed above in section 2.1.2.2. The scope of the term must therefore be understood to be similar.<sup>24</sup>

The scope of the duty to disclose information is connected to the term “essential circumstances”. The evaluation for what being considered “essential circumstances” must be seen in relation to the requirement of inducement. Martinussen says essential circumstances necessary to disclose may for instance be that a car has been in a collision.<sup>25</sup>

The duty to disclose information is not mentioned elsewhere in the Norwegian Sale of Goods Act, indicating there is no explicit general duty to disclose information in contracts for the sale of goods.<sup>26</sup> The rule in section 19 of the Norwegian Sale of Goods Act cannot be understood to be a general rule. There is a limitation present in the application of this section of the act. It only covers items sold “as is” or with other similar reservations. This is a traditional “as is” clause intending to limit the liability of the vendor. The vendor is however not able to eliminate liability for damages he “must have known”.<sup>27</sup> Selvig holds that the common rules imposing a duty to disclose information must apply also to contracts for the sale of goods despite the lack of a general rule in the act.<sup>28</sup> The common rules

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<sup>24</sup> See also Martinussen (2001) p. 185 – 186.

<sup>25</sup> *ibid.* p. 185.

<sup>26</sup> Selvig (2001) p. 174.

<sup>27</sup> Stordrange (1995) p. 21.

<sup>28</sup> Selvig, *op.cit.*, p. 174.

imposing a duty to disclose information will be discussed below in section 2.1.3 and section 2.1.4.

The level of fault necessary to be held liable for breach of duty to disclose information and the consequences of breach will be discussed commonly in section 2.1.5 and 2.1.6 below.

### 2.1.3 Duty to disclose information arising from application of the rules in The Norwegian Contract Act, section 33

In this section I will discuss whether a duty of information can be implied by the rules enacted in section 33 of the Norwegian Contract Act and the scope of such a duty.

#### 2.1.3.1 Introduction

Simonsen introduces the following translation of section 33 of the Norwegian Contract Act:

*“Even if a declaration of intention otherwise had to be regarded as valid, it does not bind the person who has given it, if, owing to circumstances present when the other party received knowledge of the declaration and which it must be assumed that he knew of, it would be contrary to decency and good faith, if he claimed the declaration.”*<sup>29</sup>

The rule in section 33 of The Norwegian Contract Act implies nullity if it would be deemed indecent to claim the declaration considering the circumstances present.<sup>30</sup> Woxholth argues the principle of freedom in contract indicates that contracts can be entered into without hindrances and with simplicity. However if a party to a contract is behaving indecent in relation to another party he should not be able to profit from the freedom of the principle.<sup>31</sup>

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<sup>29</sup> See *Mistake, Fraud and Duties to Inform in European Contract Law* (2005) p. 153.

<sup>30</sup> Woxholth (2001) p. 324.

<sup>31</sup> *ibid.* p. 325.

Woxholth furthermore holds that the rule in section 33 of the act does not clearly define what circumstances are being deemed null, and identifies the rule to be an umbrella section covering and supplying other rules imposing nullity.<sup>32</sup>

In the following I will discuss whether it is possible to identify a duty to disclose information based on the rules enacted in section 33 of the act in subsection 2.1.3.2 below. Furthermore I will identify the scope of the duty to disclose information in subsection 2.1.3.3 below.

The level of fault necessary to be liable for breach of a duty to disclose information and the consequences of breach will be discussed commonly in section 2.1.5 and 2.1.6 below.

#### 2.1.3.2 Identification of the duty to disclose information

Clearly section 33 of the Norwegian Contract Act does not explicitly mention a duty to disclose information. As mentioned above the section does however identify conditions for nullifying a declaration of intention. Three cumulative conditions leading to nullification can be identified. First, certain “circumstances” must be present, second, the receiver of the declaration “must be assumed” to know the circumstances, and third, it must be considered “contrary to decency and good faith to claim the declaration”. The question is whether the existence of a duty to disclose information can be identified from interpreting these three conditions.

The first condition identified deals with circumstances. Woxholth says “circumstances” can be most everything.<sup>33</sup> The essential matter is whether not revealing the circumstance is considered contrary to decency and good faith. This will be discussed below. According to Hagstrøm the most important circumstance potentially causing nullity is connected to the delusion of the person giving his declaration of intention.<sup>34</sup> The delusion can be based in a

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<sup>32</sup> Woxholth (2001) p. 325.

<sup>33</sup> I.c.

<sup>34</sup> Hagstrøm (2003) p. 141.

misunderstanding or in lack of knowledge. Hagstrøm furthermore claims it is necessary that the delusion must have induced the contract.<sup>35</sup> I will discuss inducement below in section 2.1.3.3.

The second condition identified deals with knowledge. The essential here is whether the receiver of the declaration knew about the circumstance. Woxholth holds that the wording of the act implies that only actual positive knowledge of the circumstance fulfils the requirement of knowledge.<sup>36</sup> Whether the knowledge of the delusion should cause the declaration to be null depends in turn on whether it would be considered “contrary to decency and good faith” to claim the declaration valid.<sup>37</sup> If it can be considered “contrary to decency and good faith”, Hagstrøm argues the receiver of the declaration would have a duty to provide the information to eliminate the delusion.<sup>38</sup>

The third condition is that it must be “contrary to decency and good faith to claim the declaration.” Considering the identifications made above, this condition seems to be of essential significance. The question to be answered is then what is considered to be “contrary to decency and good faith”. Simonsen argues that “what might be contrary to ‘honest behaviour and good faith’ has to be determined after a concrete evaluation of the particular circumstances at the time of the formation of the contract.”<sup>39</sup> Woxholth claims the expression “good faith” has limited or no independent significance in this matter.<sup>40</sup> The essential evaluation is therefore what lays in the expression “decency”. Woxholth stresses that the evaluation should be objective.<sup>41</sup> It seems difficult to set a general standard for

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<sup>35</sup> Hagstrøm (2003) p. 141.

<sup>36</sup> Woxholth (2005) p. 337.

<sup>37</sup> Hagstrøm, op. cit., p. 136.

<sup>38</sup> l.c.

<sup>39</sup> *Mistake, Fraud and Duties to Inform in European Contract Law* (2005) p. 153.

<sup>40</sup> Woxholth, op. cit., p. 336.

<sup>41</sup> l.c.



decency, instead particular characteristics of a transaction may indicate the standard to be adopted.

Recapitulating the identifications made above it seems that the application of the rules in the Norwegian Contract Act section 33 may in certain circumstances sum up to the existence of a duty to disclose information. The existence of the duty is however subject to an independent evaluation of whether it would be “contrary to decency and good faith” not to disclose the information.

#### 2.1.3.3 Scope of the duty to disclose information

Under this subsection I will discuss the scope of the duty to disclose information, meaning an identification of what information must be disclosed. In my understanding the identification of what information being subject to a duty of disclosure is nearly connected to the requirement “contrary to decency and good faith” discussed above in section 2.1.3.2. The reason for this understanding is that the standard of decency may indicate what information being necessary to disclose in the particular circumstance. The requirements of “circumstances” and knowledge is nevertheless relevant also to identify the scope of the duty.

Firstly, the duty is connected to circumstances. Woxholth holds that the term circumstances as used in section 33 of the act only covers facts.<sup>42</sup> This is identified as an opposite to hypotheses. Woxholth acknowledges that the border between facts and hypotheses may not always be clear, and argues the core of the matter therefore is whether it would be deemed indecent to claim the declaration.<sup>43</sup> Based in the requirement for decency Hagstrøm says that the creditor is entitled to the information he had reasons to expect being disclosed.<sup>44</sup> He continues acknowledging that the scope of the duty to disclose information therefore will be based on complex evaluations. Factors identified to be evaluated are the knowledge

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<sup>42</sup> Woxholth (2001) p. 334.

<sup>43</sup> I.c.

<sup>44</sup> Hagstrøm (2003) p. 142.

and positions of the parties, relevant and important information about the performance of the contract, whether there are any significant privileges or obligations connected to the contract item, and whether lawful authorities have imposed limitations to the usage of the contract item.<sup>45</sup> Woxholth claims that the duty of disclosure anyway generally can be said to be extensive in relations where one party has been trusted with tasks by another, for instance agents and lawyers, and where the parties are in a familiar or friendly relationship with another.<sup>46</sup>

As mentioned above Hagstrøm claims a necessity for inducement.<sup>47</sup> In connection with breach of duty to disclose information this means that the lack of information, or the incorrect understanding of the circumstance, must have been important in the decision to declare intention. According to Hagstrøm the requirement for inducement indicates that only essential information is subject to the duty to be disclosed, based on an assumption that only essential information has the potential of inducing.<sup>48</sup> The requirement for inducement may in my opinion also be a factor in the evaluation of what sort of information needs to be disclosed.

Even though it seems like it is not possible to specifically identify a general rule for what information being necessary to disclose and what information not being necessary to disclose, the factors identified by Hagstrøm above must be understood to be of essential value in the determination of whether the person receiving the declaration is bound by a duty to disclose information.

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<sup>45</sup> Hagstrøm (2003) p. 142 – 148.

<sup>46</sup> Woxholth (2001) p. 336.

<sup>47</sup> Hagstrøm op. cit. p. 141.

<sup>48</sup> Hagstrøm op. cit. p. 142.

#### 2.1.4 Duty to disclose information imposed by application of the doctrine of loyalty in contract

In this section I will discuss whether a duty of information can be implied by the rules imposed by an un-enacted duty of loyalty in contract.

##### 2.1.4.1 Introduction

According to Woxholth the parties to a contract are understood to be bound by a general duty of loyalty towards each other.<sup>49</sup> Hagstrøm argues that the Norwegian courts have defined increasingly more stringent duties based in this principle of loyalty over the years.<sup>50</sup> The Supreme Court of Norway applies the duty in the case publicised in *RT 1988 page 1078*. Judge Gjølstad states that there is a duty of loyalty in contract that requires the parties to a contract to act with care and loyalty. Furthermore this duty of care and loyalty maintains throughout the entire course of the contract.

In the following I will discuss whether it is possible to identify a duty to disclose information based on the rules imposed by the un-enacted duty of loyalty in contract in subsection 2.1.4.2 below. Furthermore I will identify the scope of the duty to disclose information in subsection 2.1.4.3 below.

The level of fault necessary to be liable for breach of a duty to disclose information and the consequences of breach will be discussed commonly in section 2.1.5 and 2.1.6 below.

##### 2.1.4.2 Identification of the duty to disclose information

Nazarian holds that a duty to disclose information may arise from statutes and from application of the rules in the Norwegian Contract Act section 33, and also based in the un-enacted principles of duty of loyalty in contract.<sup>51</sup> According to Woxholth it has been held in theory that a contract can be deemed null if a party to the contract acts with disloyalty

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<sup>49</sup> Woxholth (2001) p. 338.

<sup>50</sup> Hagstrøm (2003) p. 73.

<sup>51</sup> Nazarian (2007) p. 359.

towards the other party when entering into the contract.<sup>52</sup> The disloyalty must however be assumed to be of significance for the other party in entering into the contract.<sup>53</sup> In relation to a duty to disclose information the vital matter must be whether it can be considered to be contrary to the duty of loyalty to withhold the information.<sup>54</sup> If holding back information is considered disloyal the duty to disclose information must be understood to have been breached.

From the discussion above I find it clear that it is possible to identify a duty to disclose information based on the rules imposed by the un-enacted duty of loyalty in contract.

#### 2.1.4.3 Scope of the duty to disclose information

As mentioned above the essential requirement for a duty to disclose information is that it must be considered disloyal to withhold the information. An obvious starting point to identify the scope of the duty is therefore to identify the meaning of expression “loyalty”.

It may seem like an interpretation of what is contrary to loyalty will easily also be considered indecent in relation to the rules in section 33 of The Norwegian Contract Act discussed above. According to Nazarian section 33 of the Norwegian Contract Act may actually be considered a codification of the un-enacted duty of loyalty in contract.<sup>55</sup> In the Supreme Court of Norway case published in *RT 1984 page 28* it is nevertheless held that the duty of loyalty has an independent significance, and also that the duty of loyalty has a wider field of operation than section 33 of The Norwegian Contract Act. Nazarian holds that this indicates a more stringent duty of caution based in the un-enacted duty of loyalty than what follows from section 33 of the Norwegian Contract Act.<sup>56</sup> In the Supreme Court

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<sup>52</sup> Woxholth, op. cit., p. 338.

<sup>53</sup> I.c.

<sup>54</sup> Woxholth (2001) p. 102.

<sup>55</sup> Nazarian (2007) p. 67.

<sup>56</sup> Ibid. p. 102.

of Norway case published in *RT 1995 page 1460* the majority (four to one) holds that stringent requirements concerning the duty of loyalty between the parties are necessary.

The Supreme Court of Norway furthermore holds, in the same case, that the evaluation of whether the duty to disclose information is fulfilled must be based on whether knowledge would have significance for the decision to enter into the contract, alternatively whether the contract would have been entered into on different terms. It is therefore indicated a requirement for inducement. In addition the Supreme Court of Norway also ascertain that the requirement for knowledge is that the party should have understood the failure to disclose information would influence the decision on whether to enter into the contract.

The discussions above makes it clear that the scope of a duty to disclose information imposed by the rules in the un-enacted duty of loyalty is somewhat wider than for a duty of disclosure imposed by application of the rules in section 33 of The Norwegian Contract Act. Whereas the rules in section 33 of The Norwegian Contract Act tends to require a disparity between the parties to the contract entered into, the un-enacted duty of loyalty is also applicable for contracts where the parties are considered equal. From the discussions above it can nevertheless be identified requirements for knowledge and inducement also for a duty to disclose information based on the un-enacted duty of loyalty. Woxholth claims it is easier for the courts to apply a duty to disclose information to the parties entering into a contract with each other based in the un-enacted duty of loyalty than for the court to base the duty on the requirement of being contrary to decency in section 33 of The Norwegian Contract Act.

#### 2.1.5 Liability

In this section I will discuss the level of fault necessary to be established for a party to be held liable for breach of duty to disclose information, and in turn also to be liable for damages.

Woxholth identifies the liability to be connected to whether the reason for nullification is considered *strong* or *weak*.<sup>57</sup> The *strong* reasons may nullify contracts where a receiver of a declaration has acted with attentive good faith.<sup>58</sup> The *weak* reasons may nullify contracts where a receiver of a declaration must have acted with either actual knowledge or assumed knowledge, indicating at least negligence.<sup>59</sup> The rule imposed by section 33 of the contract act is considered a *weak* reason.<sup>60</sup> This indicates the main rule for being held liable for breach of duty to disclose information should be negligence or wilful conduct.

Based on the discussions above this concurs with the understanding adopted by The Supreme Court of Norway in the case published in *RT 1995 page 1460* in relation to duty to disclose information imposed by the un-enacted duty of loyalty. The literate understanding of section 33 of the Norwegian Contract Act, however, requires that “it must be assumed that he knew”. This indicates a positive knowledge is necessary. Hagstrøm nevertheless holds that it is commonly accepted in Norway to include circumstances one “should be aware of” in relation to the duty to disclose information.<sup>61</sup> He furthermore stresses that the Supreme Court of Norway has actually applied section 33 of the Norwegian Contract Act to negligent behaviour.<sup>62</sup>

The main rule of negligence or deliberate fault must therefore be understood to define the level of fault necessary to be held liable for breach of duty to disclose information imposed either by the rules in section 33 of The Norwegian Contract Act or by the rules in the un-enacted duty of loyalty in contract.

The rules enacted in the Norwegian Insurance Contract Act specifies as discussed above in section 2.1.2.1 a requirement for knowledge by the expression “must understand”. This

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<sup>57</sup> Woxholth (2001) p. 304.

<sup>58</sup> l.c.

<sup>59</sup> l.c.

<sup>60</sup> Woxholth (2001) p. 304.

<sup>61</sup> Hagstrøm (2003) p. 150.

<sup>62</sup> See for instance case published in *RT 1984 p. 28*.

requirement is similar to “the must have known” requirement introduced in relation to The Norwegian Sale of Property Act and The Norwegian Sale of Goods Act discussed in the next paragraph. The same requirements for fault must be understood to be necessary. The Norwegian Insurance Contract Act also includes special rules requiring deliberate misconduct. These rules will be discussed below in section 2.1.6.3.

The rules enacted in the Norwegian Sale of Property Act specifies as discussed above in section 2.1.2.2 a requirement for knowledge by the expression “knew of or could not have been unaware of”, or “must have known” . The Norwegian Sale of Goods Act discussed above in section 2.1.2.3 involves a similar requirement for knowledge. Martinussen holds that the expression “must have known” indicates a level of fault somewhere in between negligence and gross negligence.<sup>63</sup> This means that regular negligence will not be sufficient, while gross negligence clearly is sufficient.

The knowledge of the person being in breach of duty to disclose information is also relevant for the liability for damages. Hagstrøm identifies *contractual culpa* to be the main rule.<sup>64</sup> He furthermore holds that *contractual culpa* is similar to negligence in normal tort law. Based on the discussion above negligence seems to be the requirement both for being held liable for breach of duty to disclose information and for being held liable for damages. Exceptions must be present where the enacted duty of disclosure has different requirements for knowledge incorporated in the actual statute. In connection with pre-contractual duty to disclose information the rule of culpa is identified as *culpa in contrahendo*.<sup>65</sup>

#### 2.1.6 Consequences of breach

The consequences of breach of duty to disclose information and the remedies available depend on the rules from which the duty has been imposed. As mentioned above breach of duty to disclose information by the un-enacted duty of loyalty in contract or by the

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<sup>63</sup> Martinussen (2001) p 185.

<sup>64</sup> Hagstrøm (2003) p 452.

<sup>65</sup> Ibid p. 459.

Norwegian Contract Act section 33 lead to the contract being deemed null. In connection with breach of duty to disclose information where the duty has been imposed explicit by statute, the statute often includes regulations defining also the results of breach. In addition to nullification of the contract it may be possible to claim damages.

In the following I will discuss the mechanisms connected to nullification of a contract in section 2.1.6.1, and also the requirements for claiming damages in section 2.1.6.2. Finally I will discuss the particular rules concerning duty to disclose information explicitly imposed by statute in section 2.1.6.3.

#### 2.1.6.1 Nullification of contract due breach of duty to disclose information

As discussed above, breach of duty to disclose information gives reason to render a contract null independent of resulting from application of section 33 of the Norwegian Contract Act or the un-enacted duty of loyalty in contract. The contract will nevertheless not be rendered null automatically. It is necessary for the party claiming a breach of the duty to disclose information to plead the contract null based on application of either set of rules.<sup>66</sup> If successful Hagstrøm holds that a null contract may give reason for a return of all transfers made in the course of contract.<sup>67</sup> The general rule is according to Woxholth that the contract may be ended, resulting in contractual obligations laid on both the parties loose their application.<sup>68</sup> If the contract is rendered null before completion of obligation by either of the parties, the obligations cease to exist. If the contract is rendered null after completion of obligations the main rule is restitution of all completed obligations.<sup>69</sup> Hagstrøm argues that if the contract is rendered null it implies that the parties are bound by a mutual duty of full restitution.<sup>70</sup> Although the main rule is full restitution, there are exceptions. Woxholth identifies exceptions from the main rule if the contract item has been legally transferred to

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<sup>66</sup> Woxholth (2001) p. 301.

<sup>67</sup> Hagstrøm (2003) p. 672.

<sup>68</sup> Woxholth, op. cit., p. 294.

<sup>69</sup> l.c.

<sup>70</sup> Hagstrøm, op. cit., p. 301.



a third person or if the contract item is lost or damaged.<sup>71</sup> If the exceptions are present it may however be possible to claim damages according to the general rules for damages in tort.<sup>72</sup>

It is important to note that normally the courts will only be able to make decisions covering the full contract. Woxholth argues it is not possible to render only parts of the contract null.<sup>73</sup>

#### 2.1.6.2 Damages for void contracts

In addition to restitution after pleading a contract void it is also possible to claim damages. In the Supreme Court of Norway case published in *RT 2002 page 1120* it was held that it can be awarded damages for loss and expenses being a direct result from entering into the contract in connection with void contracts. The general conditions for claiming damages in Norwegian law must be assumed to apply. This means it is necessary to prove an actual economical loss, liability for the loss, adequacy and finally a causal connection.<sup>74</sup> The requirement of causal connection is however somewhat modified in connection with contract law. It is necessary to distinguish between positive and negative expectation interests.<sup>75</sup> The positive expectation interest is based on the assumption of the position of the parties had the contract been completed satisfactory, and includes losses caused by the contract. The negative expectation interest is based on the assumption of the position of the parties if the contract was not entered into, and includes expenses in connection with the contract.<sup>76</sup> In connection with a void contract, in which restitution is a result, application of the negative expectation interests must be the standard.<sup>77</sup> In the following I will discuss these four mentioned conditions in relation to void contracts due breach of duty to disclose

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<sup>71</sup> Woxholth, op. cit., p. 294 – 295.

<sup>72</sup> *ibid.* p. 295.

<sup>73</sup> Woxholth (2001) p. 303.

<sup>74</sup> Hagstrøm (2003) p. 519.

<sup>75</sup> *l.c.*

<sup>76</sup> Hagstrøm. op. cit. p. 520 – 521.

<sup>77</sup> *ibid.* p. 521.

information. The requirement of economical loss and the negative expectation interest will be discussed together. The requirement for liability was discussed above in section 2.1.5.

Firstly it is an absolute requirement for claiming an award for damages that there has been an economical loss.<sup>78</sup> The requirement of economical loss is nearly connected to the requirement of causal connection because the causal connection will identify which expenses that may be covered by an award for damages. As mentioned above the causal connection in relation to void contracts will be that of negative expectation interests. The negative expectation interest usually includes different categories of expenses.<sup>79</sup> Hagstrøm identifies four categories.<sup>80</sup> The first category is negotiation fees and expenses. This includes expenses in preparing offers, expenses for lawyers and consultants, and other expenses occurring before contract is entered into. The second category is contract expenses. This includes expenses arising from the actual entering into contract, and includes documentation fees and provisions. The third category is fulfilment expenses. This includes the expenses necessary to fulfil the contractual obligations. The fourth category is expenses in connection with lost employment. This includes loss in connection with not entering into other obligations in trust of the fulfilment of the contract entered into being fulfilled. The essential characteristics for all these expenses are that they have occurred because the party trusted the contract would be fulfilled.<sup>81</sup>

Next, the requirement for adequacy must be fulfilled. This involves that the loss must be considered foreseeable.<sup>82</sup> In the Supreme Court of Norway case published in *RT 1983 page 205* the following definition for adequacy of the loss was adopted: It must be a reasonable close connection to the breach, the loss must not be too distant, a derivative or

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<sup>78</sup> Hagstrøm. (2003) p 535.

<sup>79</sup> *ibid.* p. 521.

<sup>80</sup> *ibid.* p. 521 – 522.

<sup>81</sup> *ibid.* p. 522.

<sup>82</sup> *ibid.* p. 526.

unforeseeable.<sup>83</sup> The understanding of what is considered adequate may therefore be subject to an independent evaluation based on circumstances around the particular contract and the parties to the particular contract. Consequential loss however, is according to Hagstrøm always considered foreseeable.<sup>84</sup>

### 2.1.6.3 Particular consequences of breach of duty to disclose information explicitly imposed by statute

#### 2.1.6.3.1 The Norwegian Insurance Contract Act

In this subsection I will discuss the particular consequences following from breach of duty to disclose information imposed by The Norwegian Insurance Contract Act.

Section 4-2 in the Norwegian Insurance Contract Act includes rules concerning the breach of duty to disclose information imposed by the rules of the act discussed in section 2.1.2.1 above. The section reads:

*If the insured fraudulent has failed to fulfil the duty to disclose information according to section 4-1 of this act, and a circumstance releasing a claim by the insurance, the insurer has no liability towards the insured.*

*If the insured otherwise than fraudulent has failed to fulfil the duty to disclose information, and he cannot alone be held responsible, the liability held by the insurer may be limited or waived.*

*In decisions based on subsection two of this act it shall be taken into consideration what consequences the failure has had for the insurer's evaluation of the risk, the fault of the insured, the damage and other circumstances.*

In this section of the act there can be identified two different levels of breach. Subsection one requires fraudulent behaviour, or wilful conduct, as mentioned in section 2.1.5. above. Subsection two covers all other breach than fraudulent. It is important to note that the rules

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<sup>83</sup> See RT 1983 page 205 at page 221.

<sup>84</sup> Hagstrøm (2003) p. 543.

in this section are applicable only if a claim has been released in respect to the coverage of the insurance. In relation to the requirement for knowledge discussed in section 2.1.2.1 above, fraudulent behaviour means that the person effecting the insurance wilfully has given incomplete or incorrect information with the intention of getting better terms than what would be available if based on correct and complete information.<sup>85</sup> If the breach of duty to disclose information is found to be fraudulent the insurer has no liability to disburse claims in connection with the insurance agreement in matter.<sup>86</sup> Brynildsen holds that the burden of proof imposed on the insurer in connection with claimed fraudulent behaviour is very stringent.<sup>87</sup>

If fraudulent behaviour cannot be proved, section two of the act applies. The insurer is given the possibility to limit or waive disbursement of claims. Section three of the act identifies the factors to be considered in the evaluation of whether the disbursement of claims should be limited or waived.

There are further rules identifying consequences of breach of duty to disclose information in section 4-3 of the act. Section 4-3 reads:

*If the insurer gains knowledge to that the information he has been given about the risk is incorrect or incomplete in essential parts, the insurer may cancel the insurance by 14 days notice. Section 3-7 subsection two is applied similarly. If the insured has acted fraudulent, the insurer may cancel the actual insurance and others held with immediate effect.*

This section is applicable if the insurer gains knowledge that the information given by the person effecting the insurance was incorrect or incomplete without the need of a claim being made by the insured. The insurer is in such circumstances entitled to cancel the insurance. If the insured has acted fraudulent according to the criteria discussed in the

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<sup>85</sup> Brynildsen (2001) p 70.

<sup>86</sup> *ibid.* p 73.

<sup>87</sup> *ibid.* p. 72.

paragraph regarding section 4-2 of the act, the insurer may cancel the insurance with immediate effect. If fraudulent act cannot be proved the insurance may be cancel by 14 days notice.

Based on the discussion above it seems like the normal rules concerning breach of duty to disclose information must be understood to be unavailable for breaches in connection with contracts for insurance. If the insurer has suffered a loss it is assumable possible for the insurer to sue for damages in tort.

#### **2.1.6.3.2 The Norwegian Sale of Property Act**

In this subsection I will discuss the particular consequences following from breach of duty to disclose information imposed by The Norwegian Sale of Property Act.

Section 3-7 of the act discussed above in section 2.1.2.2 clearly states that “the property has a defect” if there has been a breach of duty to disclose information.

The available remedies for defects in relation to contracts for the sale of property are enacted in the sections 4-8 through to 4-16 of the act. Defects in contract will fall outside the scope of this thesis according to the delimitations in the main introduction.

#### **2.1.6.3.3 The Norwegian Sale of Goods Act**

In this subsection I will discuss the particular consequences following from breach of duty to disclose information imposed by The Norwegian Sale of Goods Act.

Section 19 subsection one of the act discussed in section 2.1.2.3 above clearly states that “there is a defect” if the duty to disclose information imposed by alternative b) of the section has been breached.

The available remedies for defects in relation to contracts for the sale of goods are enacted in the sections 30 through to 40 of the act. Defects in contract will fall outside the scope of this thesis according to the delimitations in the main introduction.

### 3 English Contract Law

Under this head will be discussed the rules connected to duty to disclose information (3.1) and duty of examination (3.2) under English contract law.

#### 3.1 Duty to provide information

In the first part of this section of the thesis I will concentrate on the identification and discussion of the rules concerning the duty to provide information under English contract law.

##### 3.1.1 Introduction

The objective under this head is to identify whether there exists a general duty to provide information between parties entering into contract in English contract law. According to Beatson<sup>88</sup> “the general rule of the common law is that a person contemplating entering a contract with another is under no duty to disclose information to that other.” This understanding is also the understanding applied and expressed by the House of Lords in the case *Bell v. Lever Bros. Ltd.*<sup>89</sup> in which Lord Atkin submits that “[o]rdinarily the failure to disclose a material fact which might influence the mind of a prudent contractor does not give the right to avoid the contract.” Turner<sup>90</sup> however approves the general rule, but argues that even though there usually will be no obligation to disclose information there are “specific types of transaction and relation” where the law imposes a duty to disclose all facts. These “specific types of transaction and relation” will be discussed below in subsection 3.1.2.

Furthermore Turner identifies that there is a general duty of truthfulness in “all transactions and relations known to the law.” A deviation from this “general duty of truthfulness” may in certain circumstances lead to a misrepresentation being made. The concept of misrepresentation is in my understanding nearly related to the disclosure of information and will be discussed below in subsection 3.1.3

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<sup>88</sup> Beatson (2002) p. 236

<sup>89</sup> *Bell v. Lever Bros. Ltd.* [1932] A.C. 161

<sup>90</sup> Turner (1990) p. 3.

Acknowledging that there is no general duty to disclose information in English contract law, the following discussion will concentrate on the above mentioned exceptions where a duty to disclose information is being imposed. Furthermore I will also discuss the rules concerning misrepresentation.

### 3.1.2 Duty to disclose information

#### 3.1.2.1 Introduction

Acknowledging the fact stated above that the general rule of English contract law is that there is no duty to disclose information, there are certain exceptions. These exceptions are connected to transactions where the nature of the transaction itself gives origin to a duty to disclose information, and transactions where the relationship between the parties generates a duty to disclose information. Based on these two conditions Turner identifies four groups of situations where a duty to disclose information is imposed.<sup>91</sup> The four groups are; duty to disclose information in contracts *uberrimae fidei*, duty to disclose information in relation to court, tribunal or state agency, duty to disclose information in relations of confidence, and duty to disclose information in relations of influence or advantage.

In the following I will first define the scope of the duty to disclose information, and then continue to discuss the groups of situations mentioned above.

#### 3.1.2.2 The duty to disclose information defined

##### 3.1.2.2.1 "Disclosure"

Firstly, when discussing a duty to disclose information it is important to identify what is meant by the word disclosure itself in the context of contract law. The word disclosure is to be understood as the communication of existing facts and past events.

##### 3.1.2.2.2 "Legal basis"

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<sup>91</sup> See Turner (1990) p. 5.

Secondly, the legal basis from which the duty to disclose information arises must be identified. As the duty to disclose information arises before the contract is actually entered into, the duty to disclose information can obviously not arise out of the contract itself.<sup>92</sup> In the Court of Appeal case of *Joel v. Law Union and Crown Insurance Co.*<sup>93</sup> Lord Justice Fletcher Moulton states that providing information “is merely the fulfilment of a duty - it is not contractual”. In *March Cabaret Club & Casino, Ltd. v. London Assurance, Ltd.*<sup>94</sup> Justice May identifies the situations where the duty to disclose information is implied and says “...the duty to disclose is not based on an implied term in the contract at all; it arises outside the contract, and applies to all contracts uberrimae fidei, and is not limited to insurance contracts; it also applies, for instance, to contracts of surety, certain family settlement contracts, and other similar types of contractual relationship.”

#### 3.1.2.2.3 “Facts and past events”

The scope of the terms “existing facts and past events” mentioned above seems to be wide. According to Turner the term “fact, or “circumstance”, includes “any event or thing, present or past; and the present or past qualities, attributes, state, condition, and incidents, of any such event or thing.”<sup>95</sup>

#### 3.1.2.2.4 “Materiality”

Furthermore the duty to disclose information can only be implied to facts and circumstances which are material in the particular case. Turner identifies the general rule to be that “[a]ny fact or circumstance is deemed material to be disclosed which if disclosed would on a fair consideration of the evidence have influenced a reasonable prudent person as to whether to enter into the transaction contemplated or in deciding upon its terms, having regard to the class and character of the transaction contemplated.”<sup>96</sup> This is the

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<sup>92</sup> See Turner (1990) p. 18.

<sup>93</sup> *Joel v. Law Union and Crown Insurance Co.* [1908] 2 K.B. 863, C.A.

<sup>94</sup> *March Cabaret Club & Casino, Ltd. v. London Assurance, Ltd.* [1975] 1 Lloyd’s Rep. 169.

<sup>95</sup> Turner, op. cit., p. 27.

<sup>96</sup> *ibid*, p. 32.



same rule for materiality adopted by the majority in the House of Lords case *Pan Atlantic Co. Ltd. v. Pine Top Insurance Co. Ltd.*<sup>97</sup> There is also a requirement for materiality that there is a logical connection between the fact and the nature of the “transactions to which the proposed transaction belongs.”<sup>98</sup> This means that it is sufficient for the logical connection to be established that there is a general logical connection between the fact and transactions of the same nature as the proposed transaction. It is not necessary that the logical connection is established with the actual proposed transaction.

#### 3.1.2.2.5 “Inducement”

Although the fact is considered material to the transaction, it is not necessary that the fact has actually induced the transaction.<sup>99</sup> It is enough that the materiality has been proven in accordance with the definition discussed above.

#### 3.1.2.2.6 “Knowledge”

The fact or circumstance in matter is furthermore subject to the knowledge of the parties. In the Court of Appeal case *Joel v. Law Union and Crown Insurance Co.*<sup>100</sup> Lord Justice Fletcher Moulton that “[t]he duty is a duty to disclose, and you cannot disclose what you do not know.” This sets out the general rule for the duty of the party who normally would be under the obligation to provide information. Knowledge may however be actual or presumptive.<sup>101</sup> As for actual knowledge Turner argues it is the knowledge “shown to have been personally, and not vicariously, known to the person to whom it is attributed, and actually present to his mind at the material date.”<sup>102</sup> The definition of presumptive knowledge is somewhat wider. Turner<sup>103</sup> divides presumptive knowledge into five categories identified as (1) knowledge of facts of public notoriety, (2) facts the party should

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<sup>97</sup> *Pan Atlantic Co. Ltd. V. Pine Top Insurance Co. Ltd.* [1995] 1 AC 501.

<sup>98</sup> Turner (1990) p. 33-34.

<sup>99</sup> Ibid. p. 36.

<sup>100</sup> *Joel v. Law Union and Crown Insurance Co.* [1908] 2 K.B. 863.

<sup>101</sup> See Turner, op. cit. p. 50.

<sup>102</sup> ibid. p. 55.

<sup>103</sup> l.c.

have knowledge about in the course of his business, (3) facts subject to actual knowledge by an agent, (4) facts being a natural extension of facts of actual knowledge, and (5) presumed knowledge by law.

The facts of public notoriety include facts considered to be normally known, also general rules of the law. Facts the party should have knowledge about in the course of his business includes special knowledge peculiar to the business held. Facts subject to actual knowledge by an agent is according to general rules of agency considered to be the knowledge of the principal. There are off course exceptions to this general rule, but the scope of this work does not allow for a discussion on the law of agency. I do not consider the two last categories to need further explanation.<sup>104</sup>

#### 3.1.2.2.7 “Exact and complete, Explicit and unambiguous”

The next requirement by law is that the disclosure is “exact, complete, explicit and unambiguous.”<sup>105</sup> If the disclosure does not fulfil these requirements no disclosure is considered to have been made. The requirements are meant to provide that the facts disclosed cannot be misunderstood.

#### 3.1.2.3 The situations where a duty to disclose information is imposed

##### 3.1.2.3.1 “Duty to disclose information in contracts Uberrimae Fidei”

The contracts falling in under the term *uberrimae fidei* is the largest group of contracts where a duty to disclose information is imposed. The duty to disclose information in contracts *uberrimae fidei* arises because of the “nature of the contract being negotiated”.<sup>106</sup> The term *uberrimae fidei* means “of the utmost good faith”, distinguished from “*bona fidei*”-good faith. The prime example of contracts *uberrimae fidei* is insurance contracts. Traditionally this group of contracts also includes contracts for family settlements such as contracts to marriage and separation deeds. Contracts for the sale of land, contracts of

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<sup>104</sup> For further reading on the subject see Turner (1990) p 56 – 82.

<sup>105</sup> *ibid* p. 20.

<sup>106</sup> See Turner (1990) p. 85.

suretyship, releases and compromises, and contracts for partnership are sometimes treated as they belong to the group of contracts *uberrimae fidei*, but the correct view is that they are not.<sup>107</sup> These contracts will however sometimes be subject to a duty to disclose information imposed by tests similar to those of contracts *uberrimae fidei*. I will discuss the situations where the duty to disclose information is imposed to these contracts below. Other contracts in which “the particular circumstances of the case lay a duty to disclose information upon those negotiating for them” may as well sometimes be treated as contracts *uberrimae fidei*.<sup>108</sup> The essential peculiarity of the contracts *uberrimae fidei* is that one of the parties to the contract negotiated has exclusive knowledge being material to the proposed transaction. Furthermore the disclosure of such knowledge must be expected to influence the judgement in entering the contract and negotiating its terms.<sup>109</sup>

The foundation for imposing a positive duty to disclose information in contracts *uberrimae fidei* is originally understood to be “mercantile custom”. In *Fletcher v. Krell*<sup>110</sup> Justice Blackburn states that “[m]ercantile custom has established the rule with regard to concealment of material facts in policies of insurance, but in other cases there must be an allegation of moral guilt or fraud.” In the House of Lords case *Bell v. Lever Bros., Ltd*<sup>111</sup> Lord Thankerton refers to Justice Blackburn’s statement and continues to identify further exceptions to the general rule, which does not impose “a duty to disclose all material facts on formation of a contract”, “in cases of trustee and cestui que trust and of a company issuing a prospectus and an applicant for shares.”<sup>112</sup> Turner holds that the duty has been firmly established, and the rule imposing the duty may be referred to as the “doctrine of

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<sup>107</sup> See Poole (2006) a, p. 526.

<sup>108</sup> Turner. (1990) p.89.

<sup>109</sup> I.c. see also Beatson (2002) p. 264 and Poole, op. cit., p. 525.

<sup>110</sup> *Fletcher v. Krell* [1872] 28 L.T. 105.

<sup>111</sup> *Bell v. Lever Bros., Ltd.* [1932] A.C. 161.

<sup>112</sup> *Bell v. Lever Bros., Ltd.* [1932] A.C. 161. on p. 231-232

uberrimae fides”<sup>113</sup>. Turner furthermore argues that without a duty to disclose information in contracts uberrimae fidei “the parties cannot be placed upon equal terms.”

Contracts of insurance have been identified as the prime example for contracts uberrimae fidei. In *Rozanes v. Bowen*<sup>114</sup> Lord Justice Scrutton says “it has been for centuries in England the law that in connection with insurances of all sorts, marine, fire, life, guarantee, and every kind of policy, that as the underwriter knows nothing, and the man who comes to him to ask him to insure knows everything, it is the duty of the assured, the man who desires to have a Policy, to make a full disclosure to the underwriters, without being asked, of all the material circumstances.” This duty to disclose information is imposed by statute in The Marine Insurance Act 1906, sections 17-19. The duty formulated in The Marine Insurance Act 1906 is however not limited to marine insurance, but applies to all classes of insurance.<sup>115</sup> This became clear in *March Cabaret Club and Casino, Ltd. v. London Assurance, Ltd.*<sup>116</sup> in which Justice May states that “[a]lthough by that statute that principle is applicable only to marine insurance, it is quite clear from a large number of authorities...” “... that it applies to non-marine insurance as well.”

Even though the party applying for insurance will be likely to be the party with exclusive knowledge in the majority of the cases, the duty to disclose information is mutual. The Marine Insurance Act 1906 section 17 imposes the duty to “either party”. Likewise in *Banque Keyser Ullmann S.A. v. Skandia (U.K.) Insurance Co., Ltd.*,<sup>117</sup> in which Justice Steyn says that “reciprocal duties of the utmost good faith are owed to one another by an insured and an insurer.”

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<sup>113</sup> See Turner (1990) p. 92.

<sup>114</sup> *Rozane v. Bowen* [1928] 32 Ll. L. Rep. 98

<sup>115</sup> Turner, op. cit., p. 98.

<sup>116</sup> *March Cabaret Club and Casino, Ltd. v. London Assurance, Ltd.*, [1975] 1 Lloyd’s Rep. 169.

<sup>117</sup> *Banque Keyser Ullmann S.A. v. Skandia (U.K.) Insurance Co., Ltd.* [1987] 2 All E.R. 923.

When it comes to contracts for the sale of land it is disputed in later legal theory whether the doctrine of *uberrima fides* applies at all. This is mainly due to the remedies available for breach in these types of contracts. I will discuss the remedies below. Earlier theory however concludes the duty to disclose information in contracts in the sale of land is absolute.<sup>118</sup>

To the extent there is a duty to disclose information, it is necessary to distinguish between disclosure of defects in title and disclosure of defects in quality.<sup>119</sup> The duty to disclose information is only imposed to defects in title. Defects in quality are handled by other mechanisms in the law of contract. Defects in title can be divided into four subsections. The first is when the vendor has no title to the property, or substantial parts of the property, being sold, the second when the property is materially different from what the purchaser could expect from the contract, the third when there are encumbrances on the property, and the fourth when lawful authorities have affected the vendor's title by order or notice.<sup>120</sup> Peculiar to contracts for the sale of land, in opposite of the rule in insurance contracts, only the vendor will be under a duty to disclose information imposed by the doctrine of *uberrima fides*, not the buyer.<sup>121</sup> Although this duty to disclose information is argued to be absolute, the aspect of knowledge is to be considered. According to the principles discussed above, the doctrine of *uberrimae fides* cannot impose a duty to disclose information of information the vendor did not have knowledge of.<sup>122</sup>

Contracts of suretyship are the third type of contracts which traditionally have been classified to fall under the description of contracts *uberrimae fidei*. As I will demonstrate below this classification is subject to modifications. A contract of suretyship is a contract where a person, called the surety, enters into contract with another, the creditor, to take the

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<sup>118</sup> See Turner (1990) p. 129.

<sup>119</sup> *ibid.* p. 115.

<sup>120</sup> *ibid.* p. 119-120.

<sup>121</sup> *l.c.*

<sup>122</sup> *ibid.* p. 129.

responsibility of possible future breach of obligations of a third person, the debtor.<sup>123</sup> There are three different types of contracts falling in under the description of contract of suretyship. The first is a contract guaranteeing a cash obligation, the second is a contract guaranteeing fidelity, and the third is contracts guaranteeing for performance of a transaction. The most common are the contracts guaranteeing cash obligations. These typically include guaranteeing the payment of debts.

As mentioned above the classification of contracts of suretyship as a contract *uberrimae fidei* may be somewhat modified. It is argued the contracts of suretyship are not at all a contract *uberrimae fidei*. However the contracts of suretyship include some aspects typical to contracts *uberrimae fidei*, hence I discuss it under this head. The general conditions for imposing a duty to disclose information as discussed above are not all present in contracts of suretyship. The duty to disclose information only extends to facts and circumstances the surety would naturally expect not to exist.<sup>124</sup> In *Hamilton v. Watson*<sup>125</sup> Lord Campbell formulated the rule governing duty to disclose information in contracts of suretyship. He defined the test for imposing a duty to disclose information as “whether there is anything that might not naturally be expected to take place between the parties who are concerned in the transaction that is, whether there be a contract between the debtor and the creditor, to the effect that his position shall be different from that which the surety might naturally expect.” Lord Campbell also exemplified the rule by identifying any secret agreement or understanding between the creditor and debtor to subject to a duty to disclose information. The general condition of full disclosure of all material facts is therefore not necessary.

Contracts for family settlements do not fall within the scope of this work and will not be discussed further. Furthermore the relevancy of including contracts for family settlements has disappeared with the enactment of the Law Reform (Miscellaneous Provisions) Act

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<sup>123</sup> See Turner (1990) p. 151.

<sup>124</sup> See *ibid.* p. 158.

<sup>125</sup> *Hamilton v. Watson* [1845], 12 Cl. Fin. 109.

1970<sup>126</sup>, section 1 (1) where it is decided that contracts to marry “shall not under the law of England and Wales have effect as a contract giving rise to legal rights and no action shall lie in England and Wales for breach of such an agreement, whatever the law applicable to the agreement.”

#### 3.1.2.3.2 “Duty to disclose information in relation to courts and other third persons”

Concealment from courts and other third persons does not fall within the scope of pre-contractual duty to disclose information and will therefore not be discussed further.

However I do consider it relevant to mention that there are situations in connection with contracts where a duty to disclose information in respect of courts, public authorities and third persons may arise.<sup>127</sup>

#### 3.1.2.3.3 “Duty to disclose information in relations of confidence”

The duty to disclose information in relations of confidence arises from the nature between the parties to a contract, parties said to be in a fiduciary relationship.<sup>128</sup> There is no exact legal definition for what is meant by a fiduciary. However it is connected to the meaning of the word, namely trust. The distinct characteristic of a fiduciary relationship is that one party has a duty to act in the interest of another.<sup>129</sup> Fiduciary relationships fall into two different categories, identified as those based on status and those based on facts.<sup>130</sup> The first category, based on status, includes the relationships of principal and agent, solicitor and client, guardian and ward, and trustee and beneficiary. The duty to disclose information here arises for instance to information the agent gains knowledge about which must be deemed to be information the principal is entitled to. In such a relationship the duty of the fiduciary is “simply to disclose information acquired” when representing the principal.<sup>131</sup> If

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<sup>126</sup> Law Reform (Miscellaneous Provisions) Act 1970.

<sup>127</sup> For further reading on this subject, see Turner (1990) p. 275 – 296.

<sup>128</sup> *ibid.* p. 303.

<sup>129</sup> Beatson (2002) p. 228.

<sup>130</sup> *l.c.*

<sup>131</sup> See Turner, *op. cit.*, p. 314.

the fiduciary fails to forward the information to his principal he is in breach of the duty to disclose information under the rules fiduciary relationships.

The second category is based on a particular relation between the parties not based in status. Instead it is related to the facts which a party may have or gain knowledge of in a particular event. Furthermore the relationship between the parties must otherwise resemble that of a fiduciary relationship in terms of including the particular characteristics of such a relationship. This includes for instance isolated situations where friends, family or others are in a position to provide special advice or support to a friend or a family member and therefore act on behalf of the other. Because of the special relationship in this matters the “the fiduciary is expected to take all due care on behalf of the principal.”<sup>132</sup>

#### 3.1.2.3.4 “Duty to disclose information in relations of influence and advantage”

The final group of situations where a duty to disclose information may be imposed are those where it exists a relation of influence or advantage between the parties. Generally defined these are situations where one party can be said to be “the stronger party” and one can be said to be “the weaker party”.<sup>133</sup> These relationships fall outside the scope of this work and will not be discussed further.<sup>134</sup>

#### 3.1.2.4 Consequences of breach

Bearing in mind the fact mentioned above that the duty to disclose information is not a part of the contract itself it seems the remedies normally available for breach of contract should not be available for breach of duty to disclose information. Turner holds that the only available remedy is the avoidance of the contract.<sup>135</sup> This point of view is confirmed in the case *Glasgow Assurance Corporation v. Symondson & Co*<sup>136</sup>, in which Justice Scrutton

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<sup>132</sup> See Turner (1990) p 314.

<sup>133</sup> *ibid.* p 515.

<sup>134</sup> For further reading see *ibid.* p 515 – 727.

<sup>135</sup> *ibid.* p. 19.

<sup>136</sup> *Glasgow Assurance Corporation v. Symondson & Co.* [1911] 104 L.T. 254.



says “non-disclosure is not a breach of a contract giving rise to damages, but a ground for avoiding the contract.” This constitutes the general rule. There are however exceptions if the non-disclosure is really a fraudulent concealment of fact, or if the non-disclosure otherwise involves aspects of fraud, which off course entitles an award for damages in fraud.<sup>137</sup> Conditions for the remedies of avoidance of the contract in form of rescission and conditions for damages in fraud are the same for non-disclosure as for misrepresentation.<sup>138</sup> The conditions for these remedies will be discussed below under the head of misrepresentations.

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<sup>137</sup> See Turner (1990) p. 250.

<sup>138</sup> See *ibid.* p. 252.

### 3.1.3 Misrepresentation

#### 3.1.3.1 Introduction

Having established that there is no general duty to disclose information in English contract law, and having discussed the exceptions in English contract law where a duty to disclose information is actually imposed, I am now continuing to discuss a neighbouring topic, the one of misrepresentations. The reason why I am incorporating a discussion on misrepresentation in connection with duties to disclose information is that I feel the duty to provide correct information to be nearly connected and a natural extension to the discussion on duty to disclose information. In the following I will therefore discuss the conditions for claiming misrepresentation, the sources of law and the remedies available.

#### 3.1.3.2 Misrepresentation defined

When discussing the rules concerning misrepresentation it is necessary to first understand what is actually meant by a representation. A representation under English contract law is defined as “a statement of fact made by one person to another which influences that other in making a contract with the representor, but which is not necessarily a term of that contract.”<sup>139</sup> If the statement proves to be wrong it is called a misrepresentation. By the definition three requirements can be identified which all must be met if a statement is to be considered a representation. The first requirement is that there must be “a statement of fact”, the second is that the statement is “made by one person to another”, and the third is that the statement “influences that other in making a contract”. I will discuss these three requirements below.

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<sup>139</sup> Whincup (2001) p. 277.

#### 3.1.3.2.1 “Statement of fact”

The requirement for a “statement of fact” actually includes two requirements. It must be an actual statement and it must concern a fact. The term “statement” is understood simply to be “a positive assertion”.<sup>140</sup> The term has not been interpreted strictly by the courts. In the Court of Appeal case of *Curtis v. Chemical Cleaning & Dyeing Co. Ltd.*<sup>141</sup> Lord Denning says that “any behaviour, by words or conduct, is sufficient to be a misrepresentation if it is such as to mislead the other party.” This indicates that it is not necessary with an oral expression to be made. Behaviour such as a confirming nod or a wink in connection with a question asked will therefore be considered a statement.<sup>142</sup> Silence however can never constitute a misrepresentation.<sup>143</sup> This also follows from the fact discussed above that there is no general duty to disclose information in English contract law.<sup>144</sup>

The term “fact” basically indicates that it must be possible to prove it either right or wrong.<sup>145</sup> This means that in general it must be possible to test the rightfulness of the statement. It is suggested that the requirement of testability excludes expressions made in advertisements and in sale talks.<sup>146</sup> For the same reason opinions usually cannot lead to a misrepresentation being made. This becomes clear in the Privy Council case of *Bisset v. Wilkinson*<sup>147</sup> in which Lord Merrivale says that it is “essential to ascertain whether that which is relied upon is a representation of a specific fact, or a statement of opinion, since an erroneous opinion stated by the party affirming the contract, though it may have been relied upon and have induced the part of the party who seeks rescission, gives no title to relief unless fraud is established.”

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<sup>140</sup> Whincup (2001) p. 278.

<sup>141</sup> *Curtis v. Chemical Cleaning & Dyeing Co. Ltd.* [1951] 1 K.B. 805

<sup>142</sup> Whincup. op. cit., p. 280.

<sup>143</sup> l.c.

<sup>144</sup> See Poole (2006) a, p. 522.

<sup>145</sup> See Whincup op. cit., p. 278.

<sup>146</sup> l.c.

<sup>147</sup> *Bisset v. Wilkinson.* [1927] AC 177

Closely connected to opinions are statements of intentions or promises of future events. Failure to fulfil such intentions or promises can normally not constitute a misrepresentation. The exception is of course if the person has no intention at all to do what he or she claims to be intending.<sup>148</sup>

There is furthermore a requirement that the statement of fact constituting the representation must be unambiguous.<sup>149</sup> In the interpretation of the ambiguity of the statement the reasonable understanding of the statement given should be adopted. This means it is necessary to interpret how the statement would normally be understood.<sup>150</sup> The result of such an interpretation entails that an unreasonable interpretation of the representation by the representee can not lead to a misrepresentation having been made. This understanding was also adopted by the Court of Appeal in *McInerny v. Lloyds Bank Ltd.*<sup>151</sup>

When discussing misrepresentation it is necessary to make an additional extension to the general definition of representations. For misrepresentations it is also a requirement that the statement is proved false. The term “false” is subject to an evaluation of the degree of falseness.<sup>152</sup> Theory suggests a broad understanding of the term. This means it should be assessed whether the statement given is “substantially correct”. This definition has become the one used to set the standard for evaluating whether representations in connection with marine insurance contracts are true, and is enacted in The Marine Insurance Act 1906<sup>153</sup>, section 20 (4). The same understanding was also adopted by the Court of Appeal in *Avon Insurance plc. v. Swire Fraser Ltd.*<sup>154</sup>

#### 3.1.3.2.2 “made by one person to another”

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<sup>148</sup> See Whincup (2001) p. 279.

<sup>149</sup> Poole (2006) a, p. 522.

<sup>150</sup> *l.c.*

<sup>151</sup> *McInerny v. Lloyds Bank Ltd* [1974] 1 Lloyd’s Rep 246

<sup>152</sup> Poole, *op. cit.*, p. 522

<sup>153</sup> The Marine Insurance Act 1906

<sup>154</sup> *Avon Insurance plc. v. Swire Fraser Ltd.* [2000] 1 All E.R. 573

The next requirement for defining a representation is that it must have been “made by one person to another.” This requirement includes an indication that the statement must actually have been made by the representor and “addressed to the party misled”. This understanding was applied by the House of Lords in the case *Peek v. Gurney*.<sup>155</sup>

#### 3.1.3.2.3 “Influences that other in making a contract”

The final requirement is that the statement “influences that other in making a contract”, also defined as a requirement for inducement to enter into contract.<sup>156</sup> In the House of Lord case *Pan Atlantic Co. Ltd. v. Pine Top Insurance Co. Ltd.*<sup>157</sup> it was established it is necessary to establish both inducement and materiality. The test of materiality adopted by the majority in this case is the same as discussed above under the head of duty to disclose information, namely that it must have “influenced a reasonable prudent person” to enter into the contract. This House of Lords judgement changed the earlier general understanding that it was not necessary to establish materiality in cases of misrepresentation. Before this judgment it was held established inducement was sufficient.<sup>158</sup>

Incorporated in the requirement of inducement lays the intention of the representor that the statement should be acted upon and also that the representee actually must have acted upon the statement.<sup>159</sup> Although there is a requirement of inducement it is not necessary that the statement alone gives the reason for entering into contract, nor is it necessary that the statement is the main reason. The statement must however have been of significant influence on the decision to enter into contract.<sup>160</sup>

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<sup>155</sup> *Peek v. Gurney* [1873] L.R. 6 H.L. 377.

<sup>156</sup> See Poole (2006) a, p. 529.

<sup>157</sup> *Pan Atlantic Co. Ltd. v. Pine Top Insurance Co. Ltd.* [1995] 1 AC 501.

<sup>158</sup> See for instance *Museprime Properties Ltd. v. Adhill Properties Ltd.* [1990] 36 EG 114

<sup>159</sup> See Poole op. cit., p. 529.

<sup>160</sup> See Whincup (2001) p. 282 – 283.

### 3.1.3.3 Categories of Misrepresentation

Having discussed the general conditions to be met for a misrepresentation to be claimed, I will now continue to discuss the particular circumstances for different categories of misrepresentation. The categories of misrepresentation are connected to the person making a misrepresentation and his state of mind, e.g. fraudulent misrepresentation, negligent misrepresentation and innocent misrepresentation.<sup>161</sup> I will also discuss the rules imposed in the Misrepresentation Act 1967. Establishing the differences in the mind of the representor is important in evaluating the remedies available as will be discussed below.

#### 3.1.3.3.1 Fraudulent Misrepresentation

A misrepresentation is considered fraudulent when the representor knows the statement given is wrong.<sup>162</sup> The definition of fraud was defined by the House of Lords in the case *Derry v. Peek*<sup>163</sup> in which Lord Herschell says “fraud is proven when it is shown that a false representation is made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false.” Lord Herschell continues the speech stating that “if fraud be proved, the motive of the person guilty of it is immaterial.”

#### 3.1.3.3.2 Negligent Misrepresentation

A misrepresentation is considered negligent if the representor did not know the statement given was wrong, but however could and should have been aware that the statement given was incorrect.<sup>164</sup> The authority defining negligent misrepresentation is found in the Court of Appeal case *Esso Petroleum Co. Ltd. v. Mardon*<sup>165</sup> in which Lord Denning says that “if a man, who has or professes to have special knowledge or skill, makes a representation by virtue thereof to another – be it advice, information or opinion – with the intention of inducing him to enter into a contract with him, he is under a duty to use reasonable care to

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<sup>161</sup> See Beatson (2002) p. 243.

<sup>162</sup> See Whincup (2001) p. 284.

<sup>163</sup> *Derry v. Peek* [1889] 14 App Cas 337.

<sup>164</sup> See Whincup op. cit., p 284.

<sup>165</sup> *Esso Petroleum Co. Ltd. V. Mardon* [1976] QB 801.

see that the representation is correct, and that the advice, information or opinion is reliable.” Liability for negligent misrepresentation by statute is discussed below.

#### 3.1.3.3.3 Innocent Misrepresentation

A misrepresentation is considered innocent if the representor believed that the wrongful statement given was true, and can prove that the belief of truthfulness was reasonable grounded.<sup>166</sup> Rules concerning both negligent and innocent misrepresentations are imposed by the Misrepresentation Act 1967 discussed below.

#### 3.1.3.3.4 Misrepresentation Act 1967

The Misrepresentation Act 1967 includes rules for what remedies are available for negligent and innocent misrepresentation. Section 2 (1) defines the remedies available for negligent misrepresentations, and section 2 (2) defines the remedies available for innocent misrepresentations.

#### 3.1.3.4 Consequences of breach

In the following I will discuss the remedies available for misrepresentation and duty of disclosure. The remedies available depend on how the representation has been interpreted. In certain circumstances the representation may be of great importance to the contract so that the representation has actually become a term, implied or express, to the contract.<sup>167</sup> If the representation has become a term of the contract, the misrepresentation will be treated as a breach of contract with all the normal contractual remedies available. Breach of terms will not be discussed in this work.

If the representation however only was an inducement it is not considered breach of contract and will be governed by a different set of rules. Only remedies available for misrepresentations not considered to have become terms of the contract will be discussed below. The remedies available furthermore depend on the type of misrepresentation being

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<sup>166</sup> See Poole (2006) a, p. 539.

<sup>167</sup> See Whincup (2001) p. 283.

made, fraudulent, negligent or innocent. For fraudulent misrepresentations the remedies available are laid down by the House of Lords in the case *Derry v. Peek*<sup>168</sup> in which Lord Herschell says that “[f]raud gives rise to liability for damages for the tort of deceit and/or the right to rescind the voidable contract.” For negligent misrepresentations the available remedies are laid down by the Misrepresentation Act 1967 section 2 (1) in which it is stated that “if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently.” This indicates that the remedies available for fraudulent misrepresentations are also available for negligent misrepresentations. Exception exists in the act if the representor “proves that he had reasonable ground to believe and did believe up to the time the contract was made the facts represented were true.” This also defines how to distinguish between negligent and innocent misrepresentations. For innocent misrepresentation the primary remedy is the right to rescind the contract.<sup>169</sup> However the introduction of the Misrepresentation Act 1967 introduced a possibility for granting damages also for innocent misrepresentations. This indicates that the remedies available for innocent misrepresentation will either be rescission or damages. In addition it is possible to be granted an indemnity for innocent misrepresentation.<sup>170</sup> In the following I will discuss the remedies rescission, damages and indemnities.

As mentioned above under the head of remedies for breach of duties of disclosure, the remedies available for such breaches are rescission and damages where fraud is present. The following discussion on conditions for application of the remedies of rescission and the award for damages in fraud will therefore concern both breach of duty to disclose information and misrepresentations.

#### 3.1.3.4.1 Rescission

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<sup>168</sup> *Derry v. Peek* [1889] 14 App Cas 337

<sup>169</sup> Whincup. (2001) p. 285.

<sup>170</sup> *l.c.*



Rescission is an equitable remedy. As discussed above the remedy of rescission is available for all the different types of misrepresentation, e.g. fraudulent, negligent and innocent. Rescission means that the contract is set aside or declared ended, and furthermore that the positions of the parties are restored to how they were before the contract was entered into.<sup>171</sup> Rescission therefore relieves the parties from any obligation or duty agreed to in the contract.

Although available for all types of misrepresentation, the right to rescind the contract is not absolute. Under certain circumstances the representee may lose the right to rescind. These circumstances are in connection with affirmation or acceptance, lapse of time, if restitution is impossible, if third party interests intervene, and finally if conditions in the Misrepresentation Act 1967 have been met.

The first circumstance where the right to rescind the contract may be lost is connected to affirmation or acceptance. This exception occurs when the representee knows that the representation made was wrong and still gives indications to the representor that he or she or she wishes to continue the contract.<sup>172</sup> The authority for this exception is the Court of Appeal case of *Long v. Lloyd*<sup>173</sup> in which Lord Justice Pearce says after recapitulating the facts of the case that “all events, appears to us to have amounted ... to a final acceptance ... for better or for worse, and to have conclusively extinguished any right of rescission remaining...”

The second circumstance where the right to rescind may be lost involves the lapse of time. The rule here is that the possibility to rescind the contract is lost after a certain amount of time. In the Court of Appeal case *Leaf v. International Galleries*<sup>174</sup> Lord Justice Denning applies the same test to lost right to rescind due lapse of time as was enacted for when the

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<sup>171</sup> See Poole (2006) a, p. 539, Beale (2002) p. 519, and Whincup (2001) p. 267.

<sup>172</sup> See Poole (2006) a, p. 540.

<sup>173</sup> *Long v. Lloyd* [1958] 1 WLR 753.

<sup>174</sup> *Leaf v. International Galleries* [1950] 2 KB 86.

right to reject is lost due lapse of time in The Sale of Goods Act 1893. This indicates that “reasonable time” should be the standard. Defining what is meant by the expression “reasonable time” Lord Justice Denning says “[h]e had ample opportunity for examination in the first few days after he had bought it. Then was the time to see if the condition or representation was fulfilled.” The time in which the “reasonable time” will run from depends on the sort of misrepresentation made. If the misrepresentation made was fraudulent the time starts running when the fraud was discovered, or when the fraud reasonably could have been discovered. If the misrepresentation was innocent or negligent the time starts running from the date of contract.<sup>175</sup>

The third circumstance is when restitution is deemed impossible. This principle is sometimes referred to by the Latin expression *restitutio in integrum*. The rule is defined by Queen’s Bench in the case *Clarke v. Dickinson*<sup>176</sup>, a case of sales of shares in a mining company, in which Justice Erle says “the plaintiff cannot avoid the contract under which he took the shares, because he cannot restore them in the same state as when he took them.” The application of the rule is described by the Chancery Division in the case *Thomas Witter v. TBP Industries Ltd.*<sup>177</sup> in which Justice Jacob talks about rescission and says “[t]his remedy is not available where it is not possible to restore the parties to their position before the contract.” It is furthermore not possible to rescind only parts of a contract. This understanding is introduced by the Queen’s Bench in the case *De Molestina v. Ponton*<sup>178</sup> in which Justice Colman says “[t]here can be no doubt that, according to the present state of development of English law, this court is bound by the general principle that the misrepresentee is permitted to rescind the whole of a contract but not part of it.” He continues to declare that “[t]his has been recognised as well established since the eighteenth century.”

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<sup>175</sup> See Poole (2006) a, p. 541.

<sup>176</sup> *Clarke v. Dickinson* [1858] EB & E 148; 120 ER 463.

<sup>177</sup> *Thomas Witter v. TBP Industries Ltd.* [1996] 2 All ER 573.

<sup>178</sup> *De Molestina v. Ponton* [2002] 1 All ER (Comm) 587.

The existence of third-party interests may also extinguish the right to claim rescission.<sup>179</sup> The rule is defined by the Court of Appeal in the case *Lewis v. Avery*.<sup>180</sup> In which Lord Denning says that “the contract is voidable, that is, liable to be set aside at the instance of the mistaken person, so long as he does so before third parties have in good faith acquired the rights under it.” The way I see it the result of lost right to rescind in this context also follows as a result of the restitutio in integrum rule discussed above. It is not possible to “restore the parties to their position before the contract” if the ownership of the subject of the contract has legally passed over to a third person in good faith.

Finally there are certain rules enacted in the Misrepresentation Act 1967 which may lead to the right of rescission being lost. In section 2 (2) of the act it is stated that “the court or arbitrator may declare the contract subsisting and award damages in lieu of rescission.”

#### 3.1.3.4.2 Damages for misrepresentation

Traditionally damages for misrepresentation have only been available if the misrepresentation was fraudulent. Turner stresses that before 1963 it was a “significant difference” between fraudulent and non-fraudulent misrepresentations.<sup>181</sup> For fraudulent misrepresentations it was possible both to rescind the contract and to sue for damages. For non-fraudulent misrepresentations only rescission was possible. Turner identifies the “distinction between common law and equity” to be the reason for this difference.<sup>182</sup> In 1964 the House of Lords gave a judgement changing the rules in respect of non-fraudulent misrepresentations. I will discuss that judgement below.

For an action for damages in fraud to be successful it is necessary that the description of fraud applied by the House of Lords in the case *Derry v. Peek*<sup>183</sup> discussed above is met.

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<sup>179</sup> See Whincup (2001) p. 286.

<sup>180</sup> *Lewis v. Avery* [1972] 1 QB 198.

<sup>181</sup> Beatson (2002) p. 243.

<sup>182</sup> l.c.

<sup>183</sup> *Derry v. Peek* [1889] 14 App Cas 337.

The burden of proof lies on the one suing for damages.<sup>184</sup> If fraud is proved the next step is to consider the measure for damages. In the House of Lord case *Smith New Court Securities Ltd v. Scrimgeour Vickers (Asset Management) Ltd*<sup>185</sup> Lord Browne-Wilkinson presents four points defining the measures for damages. “First, that the measure of damages where a contract has been induced by fraudulent misrepresentation is reparation for all the actual damage directly flowing from entering into the transaction. Second, that in assessing such damages it is not an inflexible rule that the plaintiff must bring into account the value as at the transaction date of the asset acquired: although the point is not adverted to in the judgements, the basis on which the damages were computed shows that there can be circumstances in which it is proper to require a defendant only to bring into the account the actual proceeds of the asset provided that he has acted reasonably in retaining it. Third, damages for deceit are not limited to those that were reasonably foreseeable. Fourth, the damages recoverable can include consequential loss suffered by reason of having acquired the asset.” A slight limitation to the wide measures is present in the speech of Lord Justice Winn in the Court of Appeal case *Doyle v. Olby (Ironmonger) Ltd*.<sup>186</sup> where he says the liability is limited to “all the damage flowing from the tortuous act of fraudulent inducement which was not rendered too remote...”

As mentioned above damages were traditionally not available for negligent misrepresentations. The first change of circumstances came in 1964 with the House of Lords case *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd*.<sup>187</sup> in which Lord Morris of Borth-Y-Gest said: “My lords, I consider that it follows and that it should now be regarded as settled that if someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies upon such a skill, a duty of care will arise.” This “duty of care” implied a liability making it possible to claim

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<sup>184</sup> Beatson (2002) p. 244.

<sup>185</sup> *Smith New Court Securities Ltd v. Scrimgeour Vickers (Asset Management) Ltd*. [1997] AC 254.

<sup>186</sup> *Doyle v. Olby (Ironmonger) Ltd*. [1969] 2 QB 158.

<sup>187</sup> *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd*. [1964] A.C. 465.

damages also for negligent misrepresentations in fiduciary relationships.<sup>188</sup> The standard was applied by the Court of Appeal in the case *Esso Petroleum Co. Ltd. v. Mardon*<sup>189</sup> in which Lord Denning says that someone who “... negligently gives unsound advice or misleading information or expresses an erroneous opinion, and thereby induces the other side to enter into a contract with him, he is liable in damages ...” The measure of damages however is not as wide as identified above in connection with fraudulent misrepresentation. In the mentioned Court of Appeal case Lord Denning holds that one “should look into the future as to forecast what would have been likely to happen if he had never entered into this contract: and contrast it with his position as it is now as a result of entering into it.” This indicates that only a foreseeable loss is recoverable in opposite of in connection with fraudulent misrepresentations where unforeseeable loss also will be covered. It is important to notice that similar to action for damages where misrepresentation is fraudulent, the burden of proof still lays on the person claiming damages.<sup>190</sup>

Another change of circumstances in respect of award for damages for negligent misrepresentations came with the introduction of the Misrepresentation Act 1967. The rules imposed by section 2 (1) of the act place fraudulent and negligent misrepresentation on an equal footing. This entails a construction of fraud seeming to entitle damages for all loss, as would be the case with proved fraudulent misrepresentation. This means a wider measure for damages than would be the result under the common law rules discussed above. In the Court of Appeal case *Royscot Trust Ltd. v. Rogerson*<sup>191</sup> Lord Justice Balcombe confirms this understanding by saying “the finance company is entitled to recover all the losses which it suffered as a result of its entering into the agreements with the dealer and the customer, even if those losses were unforeseeable.” The burden of proof is however

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<sup>188</sup> Beatson (2002) p. 247.

<sup>189</sup> *Esso Petroleum Co. Ltd. v. Mardon* [1976] QB 801.

<sup>190</sup> Beatson, op. cit. p. 247.

<sup>191</sup> *Royscott Trust Ltd. v. Rogerson* [1991] 2 QB 297.

opposite by the rules imposed by the act. Instead of the person claiming damages having to prove negligence, the person who made the misrepresentation must prove “that he had reasonable ground to believe and did believe up to the time the contract was made the facts represented were true.”

In connection with innocent misrepresentation the granting of award for damages is limited to the situations where damages are granted instead of rescission according to the rules enacted in the Misrepresentation Act 1967 section 2 (2).

#### 3.1.3.4.3 Indemnities

For innocent representation it is also possible for the courts to grant an award for indemnities. Indemnities somewhat resembles damages, but it does not cover as widely as damages will. The width of what loss indemnities will cover was defined in the Court of Appeal case *Newbigging v. Adam*.<sup>192</sup> Lord Justice Bowen here says “that when you are dealing with innocent misrepresentations you must understand that proposition that he is to be replaced in status quo with this limitation – that he is not to be replaced in exactly the same position in all respects, otherwise he would be entitled to recover damages, but is to be replaced in his position so far as regards the rights and obligations which have been created by the contract into which he has been induced to enter.”<sup>193</sup>

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<sup>192</sup> *Newbigging v. Adam* [1886] 34 Ch.D. 582.

<sup>193</sup> See also Chancery Division case *Whittington v. Seale-Hayne* [1900] 82 L.T. 49. for examples of application of the rule.

## **4 Comparative conclusions**

Under this head I will identify the differences between the rules imposing a duty to disclose information under Norwegian law and under English law. The discussion below is based on my identifications and my opinions. The application and the basis for the duty to provide information will be discussed in section 4.1, and the consequences of breach of the duty to inform will be discussed in section 4.2. The following identifications will be based on the discussion in sections 2 and 3 above.

### **4.1 On duty to disclose information**

As identified in section 2.1.1 above the general rule in Norwegian law is held to be that there is no duty to disclose information. Likewise in section 3.1.1 above it is argued that “the general rule of the common law is that a person contemplating entering a contract with another is under no duty to disclose information to that other.” It seems like the contractual understanding indicating that the parties are responsible for their own expectations and assumption is the general rule in both English and Norwegian contract law. There are however identified exceptions imposing a duty to disclose information in both Norwegian and English Law.

In section 2.1.1 above it can be identified that in Norwegian law the duty to disclose information may arise from different legal bases. The duty may arise explicitly from statute, the duty may be implied as a consequence of other rules enacted in the Norwegian Contract Act section 33, or it may be identified by the rules in an un-enacted duty of loyalty in contract. In English law legal practice has established a duty to disclose information in certain types of contracts, as discussed in section 3.1.1 above. Although there are certain rules in Norwegian law explicitly imposing a duty of disclosure it seems like the application of the rule in section 33 of the Norwegian Contract Act is more practical. Application of the rule in section 33 of the act is however based on approximate

evaluations specific to each separate situation where a party claims breach of duty to disclose information. The common law system in England actually seems more predictable to me in this matter, at least when comparing only to a duty to disclose information based in the rules in the Norwegian Contract Act section 33.

Both English and Norwegian contract law has developed un-enacted principles indicating expected behaviour between the parties. In English contract law it has been identified a general duty of truthfulness. Behaviour contrary to the general duty of truthfulness typically leads to a misrepresentation being made. In Norwegian law it has been identified an un-enacted general duty of loyalty in contract. Behaviour contrary to the duty of loyalty may include for instance breach of duty to disclose information. The un-enacted principle present in Norwegian law seems to me to have a much wider scope of application.

Certain statutes explicitly imposing a duty to disclose information in Norwegian law has similar counterparts in English law. The first statute imposing a duty to disclose information in Norwegian law discussed above is The Norwegian Insurance Contract Act. The act imposes duties to disclose information on both the insurer and the person effecting the insurance. In English contract law the doctrine of *uberrima fides* identifies certain contract types where the duty to disclose information will be imposed. The prime example for contracts *uberrimae fidei* is insurance contracts. The doctrine imposes a duty to disclose information on both parties. The Norwegian Insurance Contract act is subject to a possibility for deviation from the act if it is a commercial company effecting the insurance. The doctrine of *uberrima fides* seems to be applied without reservations. From my understanding a contract of insurance under Norwegian law will still be subject to the applications of the rules in section 33 of the Norwegian Contract Act or the un-enacted duty of loyalty, even though it has been agreed to deviate from the rules imposed in The Norwegian Insurance Contract Act.

The next statute imposing a duty to disclose information in Norwegian law discussed above is the Norwegian Sale of Property Act. The vendor is bound by a duty to disclose



information considered to be essential for the buyer. In English law contracts for the sale of land is sometimes considered to be a kind of contract *uberrimae fidei*. Even if the contracts for the sale of land may not fall within the scope of the doctrine of *uberrima fides*, there is imposed a duty to disclose information in relation to defects in title.

The third statute imposing a duty to disclose information in Norwegian law discussed above is the Norwegian Sale of Goods Act. I have not been able to identify similar rules concerning contracts for the sale of goods in English contract law. The Norwegian rule does anyway have limited application as it applies only to contracts with reservation clauses, or “as is” clauses. The general rules for duty to disclose information either by application of the Norwegian Contract Act section 33 or the un-enacted duty of loyalty understood to apply. Contracts for the sale of goods represent an examples for situations where a duty to disclose information will be imposed under Norwegian law but not under English law. Therefore I am inclined to think that the duty to disclose information is imposed to a wider range of contracts under Norwegian law than under English law.

Although the Norwegian Contract Act section 33 has no explicit rules defining the duty to disclose information, it has been identified certain factors being relevant in the evaluation of what information being subject to a duty to disclose information. I particularly find interest in the fact that the positions of the parties and relationships of trust have been identified as factors in the evaluation of the presence of a duty to disclose information. I have identified that a duty to disclose information will be imposed to contracts where the parties are considered to be in a fiduciary relationship under English law. The examples introduced for when someone is in a fiduciary relationship are the same examples introduced in connection with relationships of trust in Norwegian law, namely lawyers and clients, and agents and principals.

English contract law has extensive rules covering misrepresentation. I have not been able to identify a general rule of same extent covering a similar mechanism under Norwegian law. There is however a resembling rule, although not discussed in this thesis, present in the

Norwegian Contract Act section 30 subsection two. The rule covers fraudulent provision of incorrect information from one party to another, and may lead to the contract being deemed null.

#### 4.2 On consequences of breach of duty to inform

The consequences of breach of duty to disclose information seems to include the same mechanisms. In Norwegian law breach may lead to nullification of the contract resulting in full restitution to the position held by the parties before entering into contract. This mechanism is similar to the remedy of rescission identified in English contract law.

Under Norwegian contract law the main rule for liability leading to the result of nullifying the contract is negligence, sometimes moving towards gross negligence. In English contract law rescission is a possible result from fraudulent, negligent and innocent behaviour.

Both English and Norwegian contract law allows for a claim for damages in connection with nullification/voidance of the contract. The main rule to be liable for damages in Norwegian contract law is understood to be negligence. In English contract law traditionally only fraudulent behaviour would lead to liability for damages. However, the situation changed first in 1963 when also negligent behaviour would lead to liability in fiduciary relationships, and then in 1967 with the introduction of the Misrepresentation Act where negligent behaviour would be sufficient to be held liable also for non-fiduciary relationships.

The measure of damages is identified to be slightly different. In Norwegian contract law the measure in connection with breach of duty to disclose information is connected to the negative expectation interests. In connection with claim for damages in Norwegian law it is a requirement for adequacy. This includes that the loss must be foreseeable. The measure for damages in English contract loss is identified to be all loss, also unforeseeable. Consequential loss falls within the measure both in Norwegian and English law.

According to the requirement for negligence in Norwegian law innocent behaviour or behaviour of good faith is identified not to be sufficient to be held liable for damages. Under English law it is however possible to be granted a reward for damages also in connection with good faith according to the rules in the Misrepresentation Act 1967.

Under English law I also identified the possibility for being granted indemnities in connection with rescission after an innocent misrepresentation. I have not been able to identify similar rules in Norwegian law.

## **5 Closing remarks**

Having discussed the rules concerning duty to disclose information in both Norwegian and English contract law I would like to end off with a few closing remarks.

I have made certain observations throughout my work with this thesis on neighbouring rules having some relevance for the issues discussed. A thesis allowing for more words would off course have room for discussing also these neighbouring rules thoroughly.

An interesting extension on the discussion on duty to disclose information would be a discussion on duty of examination. Especially in Norwegian contract law the duty of examination have some relevance, at least as a factor being able to limit the duty to disclose information.<sup>194</sup>

Furthermore a discussion on the promissory estoppel under English contract law, and whether the estoppel may bar an action for remedies for misrepresentation or breach of duty to disclose information.<sup>195</sup>

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<sup>194</sup> See for example Hagstrøm (2003) p. 331 – 339.

<sup>195</sup> See for example Poole (2006) a, p. 156 – 170.

Finally I would like to share a peculiar observation contrary to my expectation before I started working on this thesis. I had the impression it would be pronounced differences between English and Norwegian contract law in this field. The rules concerning duty to disclose information have proved to be surprisingly similar in application and consequences.

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